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No. _____

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In The

Supreme Court of the United States

October Term, 1992

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

JAMES E. GOTTSHALL *and* ALAN CARLISLE,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the court of appeals err in holding that the broad remedial purposes of the Federal Employers' Liability Act justify allowing a cause of action for the negligent infliction of emotional distress that is not generally recognized under the common law?

2. Did the court of appeals err in holding that there is a cause of action under the Federal Employers' Liability Act for the negligent infliction of emotional distress caused by acts that lack physical impact with or a threat of physical impact to the plaintiff?

3. Did the court of appeals err in holding that there is a cause of action under the Federal Employers' Liability Act for the negligent infliction of emotional distress arising solely from a plaintiff's general working conditions?

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIPS

This petition involves two cases decided by the United States Court of Appeals for the Third Circuit that involve closely related questions and for which a single petition for a writ of certiorari is being filed pursuant to Supreme Court Rule 12.2.

In the first case, the named appellant in the court of appeals, and one of the respondents here, is James E. Gottshall. In that case, the named appellee in the court of appeals, and the petitioner here, is Consolidated Rail Corporation. In the second case, the named appellee in the court of appeals, and the other respondent here, is Alan Carlisle. In that case, the named appellant in the court of appeals, and the petitioner here, is Consolidated Rail Corporation.

Petitioner, Consolidated Rail Corporation, is a publicly held corporation that is not owned by any parent corporation. Consolidated Rail Corporation has an ownership interest in the following companies: The Akron & Barberton Belt Railroad Company; Albany Port Railroad Company; Belt Railroad Company of Chicago; Calumet Western Railway Company; Chicago & Western Indiana Railroad Company; Indiana Harbor Belt Railroad Company; Lakefront Dock & Railroad Terminal Company; Nicholas, Fayette & Greenbrier Railroad Company; Peoria & Pekin Union Railway Company; Pittsburgh, Chartiers & Youghiogheny Railway Company; Railroad Association Insurance, Limited; Trailer Train Company; and Transportation Data Exchange, Incorporated. Consolidated Rail Corporation does not have an ownership

interest in any other company, except for its wholly-owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

This petition for a writ of certiorari requests review of an important and recurring issue of federal law that has confused, confounded, and sharply divided the lower federal courts: what circumstances may give rise to a cause of action for negligent infliction of emotional distress under the Federal Employers' Liability Act ("FELA"). Six years ago, in *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987), this Court suggested that in some circumstances a cause of action for the negligent infliction of emotional distress might be cognizable under the FELA. It directed the lower courts to "glean[] guidance from common-law developments" in

ascertaining whether in any particular case such a cause of action would be cognizable. *Buell*, 480 U.S. at 568.

In the two cases for which this writ of certiorari is sought, the Third Circuit Court of Appeals, far from gleaning guidance from the common law, flatly rejected the generally accepted common law tests that delineate the contours of recovery for the negligent infliction of emotional distress. In place of those tests, it adopted an expansive scheme of recovery for the negligent infliction of emotional distress that is virtually unprecedented both under the common law and under the FELA. Notably, the court of appeals in both cases sought this Court's guidance in resolving the issue. Accordingly, these cases present the ideal vehicle for this Court to address the issue left open by *Buell*.

OPINIONS BELOW

In *Gottshall v. Consolidated Rail Corporation*, the opinion of the United States District Court for the Eastern District of Pennsylvania (A-91 to A-105) is reported at 773 F. Supp. 778 (E.D. Pa. 1991). The opinion of the United States Court of Appeals for the Third Circuit (A-1 to A-72) is reported at 988 F.2d 355 (3d Cir. 1993). The order of the court of appeals denying the petition for rehearing and suggestion of rehearing in banc (A-146 to A-147) also is reported at 988 F.2d 355 (3d Cir. 1993).

In *Carlisle v. Consolidated Rail Corporation*, the opinion of the United States District Court for the Eastern District of Pennsylvania denying Consolidated Rail Corporation's motion for summary judgment (A-106 to A-114) has not been officially reported. The district court opinion

denying Consolidated Rail Corporation's motion for judgment notwithstanding the verdict or for a new trial (A-115 to A-145) is reported at 790 F. Supp. 521 (E.D. Pa. 1992). The opinion of the United States Court of Appeals for the Third Circuit (A-73 to A-90) will be reported at 990 F.2d 90 (3d Cir. 1993).

STATEMENT OF JURISDICTION

The judgment of the court of appeals in *Gottshall v. Consolidated Rail Corporation* was entered on February 8, 1993. The order denying the petition for rehearing and suggestion of rehearing in banc was entered on March 11, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

The judgment of the court of appeals in *Carlisle v. Consolidated Rail Corporation* was entered on March 29, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Federal Employers' Liability Act, 45 U.S.C. § 51, provides:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he

is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

STATEMENT OF THE CASES

A. *Gottshall v. Consolidated Rail Corporation*

On a hot day in August 1988, a Consolidated Rail Corporation ("Conrail") work gang was replacing a defective rail track in a remote area.[1] After several hours,

[1] The court of appeals in *Gottshall* was reviewing the district court's grant of summary judgment for Conrail. Accordingly, for purposes of this petition only, Conrail will assume the facts in the light most favorable to the plaintiff. *See Poller v.*

one worker, Richard Johns, had a heart attack and collapsed. The supervisor was unable to radio for help because Conrail had taken the communications base station off the air for repairs (without informing the work gang). While the supervisor drove for help, another worker, James Gottshall, one of Johns' friends, tried without success to resuscitate Johns. Johns died before the paramedics came for help. At the paramedics' instruction, Johns' body was covered and remained on the scene until the coroner arrived. The workers were ordered back to work.

Gottshall was extremely upset by the incident. For several days he returned to work, but then, fearing that he, too, would have a heart attack, he told his supervisor that he could no longer endure the hot weather conditions and the exhaustion, went home, secluded himself in his basement, and subsequently spent three weeks as an in-patient in a psychiatric institution. Gottshall experienced physical symptoms of emotional distress, including a sick feeling, loss of appetite, weight loss, cold sweats, nausea, nightmares, and insomnia. He was diagnosed as suffering from major depression and post-traumatic stress disorder.

Gottshall brought an action under the FELA against Conrail in the United States District Court for the Eastern District of Pennsylvania for the negligent infliction of emotional distress. Gottshall alleged that various management decisions made by Conrail were negligent,

Columbia Broadcasting Sys., Inc., 368 U.S. 464, 473 (1962) ("[w]e look at the record on summary judgment in the light most favorable to . . . the party opposing the motion").

including pushing him and the other members of the work gang to work in the midst of a heat wave, failing to provide adequate scheduled work breaks, discouraging unscheduled work breaks, canceling a course on cardiopulmonary resuscitation, and scheduling work in a remote job location. Federal jurisdiction was based on 28 U.S.C. § 1331.

The district court granted Conrail's motion for summary judgment (A-91 to A-105). It held that Gottshall's complaint did not give rise to a cause of action for negligent infliction of emotional distress under any accepted common law theory (A-97 to A-100), and, furthermore, that it did not satisfy the general common law tort requirements of foreseeability, cause in fact, and proximate cause (A-100 to A-105).

The court of appeals reversed (A-1 to A-72). The court held that as long as there is some "indicia of genuineness" to the injury and the claim satisfies general tort requirements of breach of duty, injury, and causation, an FELA plaintiff can recover for negligent infliction of emotional distress even if the claim does not fall within the common law physical impact, zone of danger, or bystander tests – in short, even if the claim would not be cognizable under the common law (A-64). The dissenting judge would have held that under the facts of the case, Conrail did not breach a duty to Gottshall and that Conrail could not have foreseen Gottshall's injury (A-66).

In rejecting the common law tests for the recovery of damages for the negligent infliction of emotional distress under the FELA, the Court of Appeals for the Third Circuit adopted an approach that is broader than any

previously adopted by the courts of appeals. The breadth of the court of appeals' holding is best illustrated by its very first application – *Carlisle v. Consolidated Rail Corporation.*

B. *Carlisle v. Consolidated Rail Corporation*

Alan Carlisle was a Conrail train dispatcher and then supervisor of rail operations from 1976 until 1988. In 1984, Conrail reduced its work force, which in turn had the effect of increasing the amount of work for which Carlisle was responsible. In addition, some of the equipment with which Carlisle worked was outdated and poorly-functioning. In 1988, Carlisle became a trainmaster, although he still worked at times as a supervisor and dispatcher and retained many of his former job responsibilities. Carlisle experienced stress from the demands of his job and eventually had a nervous breakdown.

Carlisle brought an action under the FELA against Conrail in the United States District Court for the Eastern District of Pennsylvania for the negligent infliction of emotional distress. Like Gottshall, Carlisle claimed that Conrail's management decisions were negligent and caused him emotional injury. Specifically, Carlisle alleged that Conrail breached its duty to provide a safe workplace by requiring him to work under unreasonably stressful and dangerous conditions, which resulted in emotional injury. Federal jurisdiction was based on 28 U.S.C. § 1331.

The district court denied Conrail's motion for summary judgment (A-106 to A-114). The jury returned a verdict for Carlisle in the amount of $386,500, and the

district court denied Conrail's motions for judgment notwithstanding the verdict or for a new trial (A-115 to A-145).

The court of appeals affirmed (A-73 to A-90). Characterizing its decision in *Gottshall* as "for the first time [upholding] recovery under the FELA for negligent infliction of emotional distress without proof of any physical impact, under circumstances where the emotional distress was accompanied by physical manifestations" (A-84), the court in *Carlisle* construed the issue before it as whether "protracted exposure to work-related, stressfully injurious conditions [can] lead to liability under the FELA" (A-87). On the basis of the general foreseeability test it had adopted in *Gottshall*, the court of appeals held that it could (*id.*).

REASONS FOR GRANTING THE WRIT

This Court should grant this petition for a writ of certiorari because: (1) the issue of what circumstances may give rise to a cause of action for negligent infliction of emotional distress under the FELA is important and recurring and has created profound conflicts among the circuits; and (2) the decisions of the Third Circuit Court of Appeals in *Gottshall* and *Carlisle* conflict with the applicable precedents of this Court.

In *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987), this Court spoke for the first time on the issue of whether a cause of action for emotional injury may be cognizable under the FELA. In *Buell*, a carman filed an FELA action, alleging that he suffered emotional injury as a result of an unsafe workplace caused by certain

incidents of harassment. Although this Court found the record insufficiently developed on the emotional injury issue, and therefore remanded to the court of appeals, it discussed certain general principles with regard to possible recovery for claims of emotional injury under the FELA. In its discussion, the Court explained that "FELA jurisprudence gleans guidance from common-law developments." *Id.* at 568.

This Court's opinion in *Buell* has spawned an abundance of litigation, but a dearth of consensus. In their struggle to determine the parameters for recovery for emotional injury under the FELA, the lower federal courts have applied widely-varying approaches. None, however, has gone as far as the court of appeals did in these cases by allowing a cause of action for negligent infliction of emotional distress under the FELA that is not generally recognized under the common law.

Notably, in both *Gottshall* and *Carlisle*, the court of appeals recognized that there is a growing need for resolution of the inter-circuit conflicts and expressly sought guidance from this Court. In *Gottshall*, the court stated that "[i]t is clear that there are open conflicts among the circuits. A review of the decisions in other circuits in the wake of *Buell* indicates that there is no common discernable, principle, test, view or attitude" (A-20 to A-21) (footnote omitted). In *Carlisle*, the court stated that "because the district courts of this circuit have rendered conflicting opinions on this topic, we see a heightened need for clear direction from this circuit and, ultimately, the Supreme Court" (A-84).

The approach adopted by the court of appeals in *Gottshall* and applied in *Carlisle* in effect transforms the FELA into a full recovery, general foreseeability statute in contravention both of the fault standard of the FELA and the holdings of this Court. Thus, in *Gottshall*, the court of appeals – although ostensibly applying traditional tort principles of duty, injury, and causation (A-44) – concluded that: (1) the predominant policy of the FELA is to assure a liberal recovery for all injured employees (A-25 to A-31); (2) the sole purpose of the common law tests – actually developed to establish reasonable limits on liability for the negligent infliction of emotional distress – is to identify genuine injuries (A-31); (3) the common law negligent infliction of emotional distress tests are to be discarded when they bar recovery under the FELA for genuine injuries (A-30); and (4) therefore, there exists a cause of action for negligent infliction of emotional distress under the FELA that is not generally recognized under the common law (*id.*).

In essence, therefore, the court of appeals held that whenever an injury has an "indicia of genuineness" and it is foreseeable, the employee will recover. In so doing, the court equated injury and foreseeability with recovery and disregarded the carefully-drawn, fault-based limitations of the common law on recovery for negligent infliction of emotional distress.

This underlying problem with the court of appeals' opinions is evident in *Gottshall*, where, while acknowledging that "the long-standing fundamental elements of bringing a FELA action are traditional common law elements" (A-29), the court nonetheless concluded that "in many ways FELA is the antithesis of

the common law" (*id.*). Thus, the court reasoned, "doctrinal common law distinctions are to be discarded when they bar recovery on meritorious FELA claims" (A-30). Accordingly, in *Gottshall*, after establishing that Gottshall's injuries were genuine (A-35 to A-44), the court of appeals held that "a reasonable employer should have foreseen" (A-49) that in the course of performing his or her job on an exceedingly hot day, a laborer such as Gottshall could suffer emotional distress. Similarly, in *Carlisle*, the court of appeals held that "when it is reasonably foreseeable that extended exposure to dangerous and stressful working conditions will cause injury to a worker, the employer may be held liable under the FELA for the employee's resulting injuries" (A-88).

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE ISSUE OF WHAT CIRCUMSTANCES MAY GIVE RISE TO A CAUSE OF ACTION FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS UNDER THE FELA IS IMPORTANT AND RECURRING AND HAS CREATED PROFOUND CONFLICTS AMONG THE CIRCUITS.

In the aftermath of *Buell*, "recovery for wholly emotional injury under the . . . FELA has become an 'important and recurring' issue of federal law." *Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270, 1282 (1st Cir.), *petition for cert. filed*, 61 U.S.L.W. 3698 (April 1, 1993) (quoting *Ray v. Consolidated Rail Corp.*, 112 S. Ct. 914 (1992) (White, J., dissenting from denial of certiorari)). It is an important issue because it involves the fundamental interpretation of a heavily-litigated federal statute.

Indeed, in the six years since *Buell* was decided, there have been in excess of eighty written opinions by the federal courts, including over twenty opinions by the courts of appeals, wrestling with the issue of what circumstances may give rise to a cause of action for emotional injury under the FELA.

The court of appeals' decisions in *Gottshall* and *Carlisle* undoubtedly will increase the amount of confusion – and litigation. In requiring only that emotional injury have an "indicia of genuineness" and be foreseeable in order for a cause of action for negligent infliction of emotional distress to exist under the FELA, the two cases open the door for innumerable claims on the part of railroad workers: every railroad laborer who works under difficult, stressful conditions arguably may state a claim under the FELA.

Clearly, such an important issue of federal law that affects so many cases across the nation deserves a uniform approach. However, there is no uniformity or consistency with regard to the circumstances that give rise to a cause of action for the negligent infliction of emotional distress under the FELA. Rather, the courts widely vary as to the requirements for such recovery. Indeed, in many cases it is even difficult to ascertain whether the court is resolving an intentional infliction or a negligent infliction of emotional distress claim. Both intra- and inter-circuit conflicts abound. Some courts of appeals have purported to avoid the issue (First and Sixth); some have required either physical impact or the threat of physical impact to the plaintiff (Third, Fifth, and Seventh); some have required "outrageous" or "unconscionable" conduct (Fourth and Sixth); and some

have permitted "full recovery" for foreseeable, genuine injuries (Third and Ninth).

In short, as the court in *Gottshall* observed, "[w]hile federal courts uniformly agree that claims for negligent infliction of emotional distress are cognizable under FELA, they are badly splintered as to the elements necessary to bring such a claim" (A-12). *See also Ellenwood*, 984 F.2d at 1282 ("The circuits vary in their treatment of such claims"). The following brief summary of post-*Buell* FELA negligent infliction of emotional distress decisions in the courts of appeals makes clear that the lower courts are in total disarray on this important question of federal law.

The Court of Appeals For the First Circuit

The Court of Appeals for the First Circuit has attempted to avoid deciding the issue of when an FELA plaintiff may recover for negligent infliction of emotional distress. In *Moody v. Maine Cent. R.R. Co.*, 823 F.2d 693, 694 (1st Cir. 1987), a case in which the plaintiff alleged that the railroad had negligently injured him through long continued harassment, the court "resist[ed] the invitation to make this a pioneer case exploring the frontier possibly opened up by *Buell*" by holding that plaintiff had failed to show causation between the alleged injury and the alleged harassment at work.

Similarly, in *Robert v. Consolidated Rail Corp.*, 832 F.2d 3, 6 (1st Cir. 1987), a case in which the plaintiff claimed that his off-the-job heart attack was caused by on-the-job harassment, the court held that the plaintiff had failed to establish that Conrail reasonably could have foreseen that he would suffer a heart attack as a result of job stress.

Finally, in *Ellenwood*, 984 F.2d at 1282,[2] a case involving Exxon's adoption of a new employment policy, the court declined to address the issue of whether the plaintiff could recover for the negligent infliction of emotional distress without showing a physical injury, explaining that because plaintiffs had "failed to present their claims of negligence with particularity [by specifying the negligent acts of commission or omission], this is not an appropriate case in which to undertake such a substantial inquiry."

The Court of Appeals for the Third Circuit

In the Court of Appeals for the Third Circuit, *Gottshall* and *Carlisle* appear to create a rather significant intra-circuit conflict. Prior to *Gottshall* and *Carlisle*, the leading Third Circuit cases concerning recovery for negligent infliction of emotional distress were *Holliday v. Consolidated Rail Corp.*, 914 F.2d 421 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 970 (1991), and *Outten v. National R.R. Passenger Corp.*, 928 F.2d 74 (3d Cir. 1991). In *Holliday*, the plaintiff claimed that his fear of being crushed in a switching operation, which he was unqualified to perform, caused him psychological injury. 914 F.2d at 422. Emphasizing that Holliday had not been involved in any accident, the court concluded that his claim was one for

[2] Although *Ellenwood* was a case brought under the Jones Act rather than the FELA, the Jones Act incorporates the fault standards of the FELA. *See* 46 U.S.C. § 688; *see also Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 547 (1960) (Jones Act extended to seamen the remedies made available to railroad workers under the FELA).

ordinary job-related stress that is not cognizable under the FELA. *Id.* at 425.

In *Outten*, the plaintiff claimed that he suffered emotional distress as a result of his awareness that a collision might take place down the track from where he was working. 928 F.2d at 75. Outten was at least one mile away from the collision when it occurred. *Id.* at 76. In analyzing Outten's claim under traditional common law negligent infliction of emotional distress principles, the court of appeals held that Outten could not recover in view of the absence of physical impact, Outten's admitted presence outside the zone of danger, and his lack of any personal responsibility for the collision. *Id.* at 79.

Thus, the Third Circuit's pre-*Gottshall* and *Carlisle* decisions strongly suggested that recovery for negligent infliction of emotional distress under the FELA is limited to cases in which the plaintiff either suffered a physical impact or faced the threat of a physical impact and does not extend to cases involving general working conditions and ordinary management decisions such as those at issue in *Gottshall* and *Carlisle*. Clearly, the court of appeals' adoption of a general foreseeability test in *Gottshall* and *Carlisle* is inconsistent with its "zone of danger" approach in *Holliday* and *Outten*.

The Court of Appeals for the Fourth Circuit

The Court of Appeals for the Fourth Circuit has held that a plaintiff must show outrageous conduct in order to recover for emotional distress under the FELA. In *Elliott v. Norfolk & W. Ry. Co.*, 910 F.2d 1224, 1229 (4th Cir. 1990), where the plaintiff sought to recover for emotional distress allegedly resulting from disputes in the

workplace with her supervisors, the court affirmed the decision of the district court dismissing plaintiff's claims, concluding that the conduct complained of simply reflected poor office relationships, not unconscionable abuse or outrageous conduct.

The Court of Appeals for the Fifth Circuit

Like the Court of Appeals for the Third Circuit, the Court of Appeals for the Fifth Circuit has taken a variety of approaches in FELA emotional injury cases. In *Gaston v. Flowers Transp.*, 866 F.2d 816, 817 (5th Cir. 1989), the court affirmed the district court's denial of recovery for negligent infliction of emotional distress under the Jones Act where a seaman saw his half-brother crushed to death, on the ground that it would represent an unwarranted and extreme expansion of liability to permit a plaintiff who did not fear for his own safety to recover under the FELA. Like the Third Circuit Court of Appeals in *Holliday* and *Outten*, the court of appeals in *Gaston* suggested that a plaintiff would have to be in the "zone of danger" to recover for negligent infliction of emotional distress. *Id.* at 819-20.

In *Plaisance v. Texaco, Inc.*, 937 F.2d 1004, 1010 (5th Cir. 1991), *on rehearing*, 966 F.2d 166 (5th Cir.) (*en banc*), *cert. denied*, 113 S. Ct. 604 (1992), the Court of Appeals for the Fifth Circuit went beyond the zone of danger test that it applied in *Gaston* and adopted an expansive, "full recovery" approach similar to *Gottshall* and *Carlisle*. In *Plaisance*, an experienced tugboat captain witnessed an explosion when a barge ruptured a pipeline. *Id.* at 1005. After reviewing the case law and the various common law theories of recovery, the court concluded that an

FELA plaintiff can recover for negligent infliction of emotional distress if a reasonable person, normally constituted, would not have been able to cope adequately with the mental distress arising from the circumstances. *Id.* at 1010. However, the court denied recovery to Plaisance because it was not reasonably foreseeable that an experienced seaman would experience an emotional reaction such as that claimed. *Id.* at 1011.

The court of appeals granted *en banc* reconsideration in *Plaisance*. The full court concluded that because the plaintiff's claim was not cognizable even under the most liberal theory of recovery, the panel should not have reached the issue of whether foreseeability alone could support a recovery for the negligent infliction of emotional distress. *Plaisance v. Texaco, Inc.*, 966 F.2d 166, 168 (5th Cir.) (*en banc*), *cert. denied*, 113 S. Ct. 604 (1992). In addition, the *en banc* court emphasized that *Gaston* remained the law of the circuit. *Id.* at 169.

The Court of Appeals for the Sixth Circuit

Like the courts of appeals in the Third and Fifth Circuits, the Court of Appeals for the Sixth Circuit has taken differing approaches to recovery for negligent infliction of emotional distress under the FELA. In *Stoklosa v. Consolidated Rail Corp.*, 864 F.2d 425, 426 (6th Cir. 1988), the court refused to decide whether a claim for negligent infliction of emotional distress without verifiable physical manifestation is actionable, holding that because Conrail had taken legitimate disciplinary action against Stoklosa, it could not reasonably have foreseen that its decision would have an extreme emotional effect on him. In *Adams v. CSX Transp., Inc.*, 899 F.2d 536, 539-40

(6th Cir. 1990), the court again refused to decide whether a claim for negligent infliction of emotional distress was cognizable under the FELA, holding instead that the plaintiff had failed to establish a breach of the employer's duty because the employer's conduct was not an "unconscionable abuse" and it was not foreseeable that the plaintiff would suffer emotional injury from his supervisor's management style.

The Court of Appeals for the Seventh Circuit

The Court of Appeals for the Seventh Circuit consistently has held – similarly to the Third Circuit in *Holliday* and *Outten* and the Fifth Circuit in *Gaston* – that there is no cause of action under the FELA for negligent infliction of emotional distress caused by acts that lack physical impact or a threat of physical impact to the plaintiff. *See Ray v. Consolidated Rail Corp.*, 938 F.2d 704, 705 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 914 (1992); *Hammond v. Terminal R.R. Ass'n of St. Louis*, 848 F.2d 95, 96 (7th Cir. 1988), *cert. denied*, 489 U.S. 1032 (1989); *Lancaster v. Norfolk & W. Ry. Co.*, 773 F.2d 807, 813 (7th Cir. 1985), *cert. denied*, 480 U.S. 945 (1987); *see also Gillman v. Burlington Northern R.R. Co.*, 878 F.2d 1020, 1024 (7th Cir. 1989).

The Court of Appeals for the Ninth Circuit

The Court of Appeals for the Ninth Circuit has allowed FELA claims for "wholly mental injury," although it has not identified specific parameters for the recovery of damages in such claims. *See Taylor v. Burlington Northern R.R. Co.*, 787 F.2d 1309, 1313 (9th Cir. 1986); *see also Pierce v. Southern Pacific Transp. Co.*, 823 F.2d 1366, 1372 n.2 (9th Cir. 1987).[3]

* * *

In sum, there simply is no consistent approach among the courts of appeals with respect to the recovery of damages under the FELA for negligent infliction of emotional distress. To the contrary, the courts are in utter disarray, both within and among the circuits. This Court should accept the Third Circuit Court of Appeals' invitation and grant certiorari to resolve these conflicts.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISIONS OF THE THIRD CIRCUIT COURT OF APPEALS IN *GOTTSHALL* AND *CARLISLE* CONFLICT WITH THE APPLICABLE PRECEDENTS OF THIS COURT.

The court of appeals' adoption in *Gottshall* and *Carlisle* of a general foreseeability test for negligent infliction of emotional distress claims under the FELA stands in sharp conflict with this Court's FELA jurisprudence. The starting point, of course, is *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987). In *Buell*, this Court directed the federal courts to "glean[] guidance from common-law developments" in resolving FELA negligent

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[3] Like the courts of appeals, the federal district courts have taken widely varying approaches to recovery for negligent infliction of emotional distress. As recognized by the court of appeals in *Gottshall*, "[t]he jurisprudence among the district courts is no more consistent" than that of the courts of appeals (A-21 n.5) (citing cases).

infliction of emotional distress claims. 480 U.S. at 568; *see also Urie v. Thompson*, 337 U.S. 163, 174 (1949).

Recognizing that, if general foreseeability were the only limiting principle, defendants sued for negligent infliction of emotional distress could face virtually unlimited liability far in excess of that justified by their degree of fault, most common law courts impose one of three tests to place reasonable limits on defendants' potential liability. A small minority of states applies the physical impact test, allowing recovery for emotional injury only if the plaintiff suffered a physical injury that induced the emotional injury. *See* Comment, *Negligent Infliction of Mental Distress: A Jurisdictional Survey of Existing Limitations Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress*, 33 Vill. L. Rev. 781, 792-93 & n.59 (1988). A larger number of states permits recovery for emotional injury if the plaintiff is in the "zone of danger" of physical impact, that is, if the plaintiff faces a threat of physical impact. *See id.* at 796-99 & n.91. Finally, another group of states grafts an exception onto the zone of danger test that allows a plaintiff to recover damages for negligent infliction of emotional distress caused by witnessing harm to immediate family members, even if the so-called bystander is not personally in the zone of danger. *See id.* at 806-13 & nn.139, 140 & 142.

The various common law tests delineating recovery for negligent infliction of emotional distress – the physical impact test, the zone of danger test, and the bystander test – each reflect policy decisions to curtail the unlimited liability that results from the imposition of a

general foreseeability test such as that adopted in *Gottshall* and *Carlisle*. *See Thing v. La Chusa*, 48 Cal. 3d 644, 654, 771 P.2d 814, 819, 257 Cal. Rptr. 865, 870 (1989) ("policy considerations mandate[] that infinite liability be avoided by restrictions that . . . somehow narrow the class of potential plaintiffs"). *See generally* Prosser, *Palsgraf Revisited*, 52 Mich. L. Rev. 1, 24 (1953) (emphasizing the need for reasonable limits on liability in negligence cases).

In formulating its general foreseeability approach, however, the Court of Appeals for the Third Circuit rejected the carefully-drawn, fault-based limitations of the common law – as well as this Court's instructions in *Buell*. In so doing, the court of appeals created broad liability for a defendant virtually unprecedented at common law. In *Gottshall*, the court held that the plaintiff had stated a cause of action because a jury could conclude that it was foreseeable that he would suffer an emotional injury because he worked under the same general working conditions that caused his friend to suffer a heart attack (A-52 to A-53). Once this rationale is accepted, it is also foreseeable that a worker on a different Conrail crew who labored under similar conditions would suffer emotional injury upon hearing of the death of Gottshall's friend. The logical extension of *Carlisle* is even more striking. Because a railroad dispatcher's job is stressful, the court of appeals concluded that his injuries were foreseeable. Arguably, this conclusion implies that all railroad dispatchers in the country have a cause of action under the *Carlisle* rationale if they can show even the slightest physical manifestation of their stress.

The court of appeals justified its disregard of the common law negligent infliction of emotional distress limits on the basis of FELA policy and on three of this Court's FELA decisions that relaxed plaintiff's burden to prove certain of the elements of common law negligence. In actuality, however, FELA policy, firmly grounded on the fault-based premise of common law negligence, does not justify allowing a cause of action that would compensate all genuine injuries just because a jury could find such injuries to be foreseeable. Moreover, the decisions of this Court on which the court of appeals relied to justify its wholesale departure from the common law do not at all support the court's position.

The operative provision of the FELA provides: "Every common carrier . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the *negligence* of any . . . such carrier. . . . " 45 U.S.C. § 51 (emphasis added). Thus, as this Court repeatedly has recognized, the FELA is not an insurance statute or a no-fault statute equivalent to state workers' compensation statutes. *See, e.g., Inman v. Baltimore & Ohio R.R. Co.*, 361 U.S. 138, 140 (1959); *Wilkerson v. McCarthy*, 336 U.S. 53, 61 (1949); *Ellis v. Union Pacific R.R. Co.*, 329 U.S. 649, 653 (1947); *see also Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958) ("The FELA and Jones Act impose upon the employer the duty of paying damages when injury to the worker is caused, in whole or in part, by the employer's fault"). The purpose of the FELA is not to "add burdens to the business enterprises of the country, but rather to promote the welfare of *both* employer and employee, by adjusting the losses and

injuries inseparable from industry and commerce to . . . those who . . . ought to share the burden." S. Rep. No. 460, 60th Cong., 1st Sess. 4 (1908) (emphasis added).

In short, this Court consistently has recognized that the FELA was designed to provide a recovery to railroad workers only when their employers are at fault. In formulating and applying its general foreseeability test, however, the court of appeals in *Gottshall* and *Carlisle* essentially ignored the fault-based premise of the FELA. Thus, in *Gottshall*, the court repeatedly emphasized its belief that Gottshall's injuries were meritorious (as opposed to fraudulent) and that the FELA should provide relief for all meritorious injuries. *See, e.g., Gottshall*, App. at A-30 (common law distinctions to be discarded when they bar recovery on meritorious FELA claims); *id.* at A-35 (issue in FELA emotional distress cases is "whether the factual circumstances . . . provide a threshold assurance that there is a likelihood of genuine and serious injury"); *id.* at A-42 (emphasizing that at oral argument Conrail did not deny that Gottshall's claim was genuine). Indeed, the court did not recognize that the common law tests for recovery for emotional injury have any purpose aside from assuring the genuineness of a plaintiff's injury. *Gottshall*, App. at A-31 (common law tests for emotional injury designed to "glean the meritorious from the feigned and frivolous"); *see also Carlisle*, App. at A-81 (common law seeks to screen fraudulent emotional distress claims from the meritorious).

Moreover, the court of appeals' reliance on certain of this Court's decisions to support the creation of its "full recovery" rule is misplaced. In *Rogers v. Missouri Pacific*

R.R. Co., 352 U.S. 500, 506 (1957), this Court concluded that where "the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought," the question of negligence is for the jury, even though the plaintiff could not demonstrate strict causation as required by the common law. In *Kernan v. American Dredging Co.*, 355 U.S. 426, 438-39 (1958), this Court held that the plaintiff could assert a negligence *per se* theory even though the regulation violated (requiring navigation lights to be set at a certain height above the water) was not designed to prevent the type of harm that resulted (an explosion caused by a navigation light placed too close to the water which was coated by flammable petroleum products). In *Urie v. Thompson*, 337 U.S. 163, 181-92 (1949), this Court held that an employee could recover for silicosis, a lung disease, even though the employee's injury was not the result of a sudden accident.

Significantly, none of these cases abandoned the common law, fault-based premise of the FELA in favor of a general foreseeability standard. Rather, they only made it easier for a plaintiff to establish a traditional negligence case: *Rogers* relaxed concepts of causation under the FELA; *Kernan* relaxed a technical restriction on principles of negligence *per se*; and *Urie* adopted a broader concept of the meaning of injury.

But this Court's pronouncements concerning liberal recoveries under the FELA do not lend support to allowing a cause of action under the FELA for the negligent infliction of emotional distress that is not recognized at common law. Rather, in the three cases

cited by the court of appeals, the Court merely allowed otherwise weak traditional negligence cases to go to the jury. *Gottshall* and *Carlisle*, however, are much different. They do not represent the relaxation of traditional negligence principles or evidentiary standards. Rather, they both allow a substantive cause of action that is not recognized at common law – a cause of action for the negligent infliction of emotional distress where plaintiff has suffered no physical impact, was not in the zone of danger, and does not satisfy the bystander test of duty. In so doing, the cases essentially create a paradigm in which, in any case involving a "genuine" injury, foreseeability becomes the functional equivalent of fault. Thus, pursuant to *Gottshall* and *Carlisle*, the plaintiff presumably will recover as long as the injury was foreseeable, without regard to the employer's fault.

In *Gottshall* and *Carlisle*, the court of appeals departed from this Court's precedent. It rejected the prevailing common law negligent infliction of emotional distress principles – despite this Court's instruction in *Buell* that FELA negligent infliction of emotional distress law be informed by the common law. And, it did so on the basis of its view that the primary purpose of the FELA is to provide a recovery for all genuine injuries – despite this Court's repeated affirmation of the fault-based nature of the FELA. Moreover, the court of appeals justified its departure from *Buell* and its allowance of a cause of action under the FELA for negligent infliction of emotional distress that is not recognized at common law on three of this Court's cases – despite the fact that none of those cases supports discarding the common law to permit new causes of action under the FELA.

CONCLUSION

For the foregoing reasons, petitioner Consolidated Rail Corporation respectfully requests that this Court grant its petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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